(3)

No. 01-704

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

THOMAS LAMAR BEAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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A. Respondent's Foreign Conviction Furnishes No Reason To Deny Review Of The Question Presented

Respondent contends (Br. in Opp. 8-13) that review of the question whether a district court has authority to remove federal firearms disabilities is unwarranted because the district court ruled in respondent's favor on the alternative ground that respondent's foreign conviction did not trigger firearms disabilities in the first place. Even if we assume that the district court ruled in respondent's favor on that alternative ground, it would not affect the propriety of granting review on the question presented in the government's petition. The Fifth Circuit ruled in respondent's favor solely on the ground that a district court has authority to remove firearms disabilities, and that holding conflicts with the decisions of five other circuits. See p. 6, *infra*. The

Fifth Circuit expressly refrained from deciding whether respondent's conviction triggered firearms disabilities. Pet. App. 11a. In these circumstances, the government appropriately limited its petition to the question whether a district court has authority to remove federal firearms disabilities, and that question plainly warrants this Court's review.

At least twice within the past year, the Court has granted petitions in similar circumstances. In *Ashcroft* v. *ACLU*, cert. granted, 121 S. Ct. 1997 (2001) (No. 00-1293), the district court granted a preliminary injunction against the enforcement of the Child Online Protection Act (COPA) on the grounds that it may impose a significant burden on speech and there may be less restrictive alternatives to further the interests underlying the Act. Pet. App. at 40a-100a, *Ashcroft* v. *ACLU*, *supra* (No. 00-1293). Without addressing those issues, the court of appeals affirmed the preliminary injunction on the ground that COPA's reliance on "community standards" violates the First Amendment. *Id.* at 1a-39a. The government's petition raised only the question whether COPA's reliance on community standards violates the First Amendment, Pet. at I, *Ashcroft* v. *ACLU*, *supra* (No. 00-1293), Pet. (I), and this Court granted the petition for a writ of certiorari, 121 S. Ct. 1997 (2001).

In *Edelman* v. *Lynchburg College*, cert. granted, 121 S. Ct. 2547 (2001) (No. 00-1072), a letter alleging discrimination was filed with the Equal Employment Opportunity Commission (EEOC) within Title VII's statute-of-limitations period, but was not verified until after the limitations period expired. Under the EEOC's regulations, verification of an otherwise timely charge relates back to the date on which the charge was filed. The district court dismissed the complaint on the

ground that neither the plaintiff nor the EEOC had treated the plaintiff's letter as a timely charge. Pet. App. at 16a-25a, *Edelman* v. *Lynchburg College*, *supra*, (No. 00-1072). Without reaching the ground relied upon by the district court, the court of appeals affirmed the dismissal on the ground that the EEOC's relation-back regulation is invalid. *Id.* at 1a-15a. This Court granted certiorari, limiting the question presented to the validity of the EEOC's relation-back regulation. 121 S. Ct. 2547 (2001).

Ashcroft v. *ACLU* and *Edelman* v. *Lynchburg College* demonstrate that when an issue resolved by a court of appeals warrants review, the existence of a potential alternative ground relied upon by the district court, but not addressed by the court of appeals, is not a barrier to such review.

Respondent's foreign conviction poses even less of an obstacle to review than the alternative grounds at issue in *Ashcroft* v. *ACLU* and *Edelman* v. *Lynchburg College* because respondent conceded in both the district court and the court of appeals that his foreign conviction triggered firearms disabilities. Respondent asserts (Br. in Opp. 9-11) that he conceded that point only in the district court, but his concession in the court of appeals could not have been clearer. Argument III in respondent's court of appeals brief is captioned: "Appellee's Foreign Conviction is a Predicate Offense for Federal Firearms Disabilities under 18 U.S.C. 922(g)(1)." C.A. Br. 18.

Nor is it even clear that the district court "held" otherwise. Br. in Opp. 9. In one part of its opinion, the district court stated that "[t]his case is a perfect illustration as to why the phrase 'any court' in 18 U.S.C. 922(g)(1) cannot be interpreted to mean 'any court in the world regardless of the severity of the crime or the

due process to which the defendant was entitled during the defense of his case." Pet. App. 32a-33a. On the other hand, the district court stated in another part of its opinion that "[d]ue to this Mexican conviction (and despite the termination of supervised release), [respondent] could not own or possess a firearm". *Id.* at 14a. Furthermore, the district court's judgment does not declare that respondent was not under firearms disabilities to begin with because his foreign conviction did not trigger 18 U.S.C. 922(g)(1). Rather, it specifies that respondent "is hereby granted relief from all disabilities imposed by Federal laws * * * resulting from his foreign conviction on May 27, 1998." Pet. App. at 37a-38a. Thus, while the district court expressed serious misgivings about treating respondent's conviction as a predicate offense, it ultimately did just that.

In his appellee's brief, respondent offered precisely that interpretation of the district court's opinion, arguing that "[w]hile the district court's comments are strongly worded, it is obvious from the judgement [*sic*] in this case that the district court recognized [the] disabilities [flowing from the foreign conviction]." C.A. Br. 20. Because the district court's opinion could be read to rest on the alternative ground that respondent's conviction did not trigger firearms disabilities, the government, out of an abundance of caution, raised that issue in its opening brief on appeal. Gov't C.A. Br. 2, 17-23. After respondent conceded in his appellee's brief that his conviction triggered firearms disabilities and that the district court's judgment recognized those disabilities, the government accepted those concessions in its reply brief, effectively removing that issue from the case. Gov't C.A. Reply Br. 8-9.

Whether or not that issue concerning respondent's foreign conviction was properly raised in this case or

remains in the case at this stage, however, it furnishes no reason for this Court to deny review of the sole question resolved by the court of appeals and presented by the government's certiorari petition—whether a district court has authority to remove federal firearms disabilities. If the Court decides that issue in the government's favor, the Court may then remand the case to the court of appeals to consider any issue that was properly raised and legitimately remains concerning the significance of respondent's foreign conviction. *Glover* v. *United States*, 531 U.S. 198, 205 (2001); *Bailey* v. *United States*, 516 U.S. 137, 151 (1995).[1]

B. The Fifth Circuit's Decision Conflicts With Decisions Of Five Other Circuits

Respondent contends (Br. in Opp. 13-15) that the Fifth Circuit's decision does not conflict with a decision of any other circuit. In fact, however, the Fifth Circuit's holding that a district court has authority to remove federal firearms disabilities conflicts with the decisions of five other circuits. *Mullis* v. *United States*, 230 F.3d 215, 219-221 (6th Cir. 2000); *McHugh* v. *Rubin*, 220 F.3d 53, 57-61 (2d Cir. 2000); *Saccacio* v. *ATF*, 211 F.3d 102, 104-105 (4th Cir. 2000); *Owen* v. *Magaw*, 122 F.3d 1350, 1353-1354 (10th Cir. 1997). *Burtch* v. *United*

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[1] The government's failure to include in its petition an additional issue concerning the legal standard a district court should apply in deciding whether to remove federal firearms disabilities also furnishes no reason to deny review of the question it did present. If the Court agrees with the government and five circuits that a district court lacks authority to remove federal firearms disabilities, the question of what standard a district court should use to decide whether to remove firearms disabilities simply does not arise.

States Dep't of the Treasury, 120 F.3d 1087, 1090 (9th Cir. 1997).

Respondent asserts (Br. in Opp. 14) that there is no conflict because the Fifth Circuit based its decision on the passage of time since its decision in *United States* v. *McGill*, 74 F.3d 64, cert. denied, 519 U.S. 821 (1996). But the five circuits holding that a district court lacks authority to remove federal firearms disabilities based their decisions on reasoning that could not be affected by the passage of time since *McGill*. In particular, those circuits reasoned that (1) the relevant text included in each ATF appropriations statute since 1992 unequivocally prohibits ATF from investigating or acting upon applications, *Mullis*, 230 F.3d at 217-218; *McHugh*, 220 F.3d at 58; (2) the judicial review provision in 18 U.S.C. 925(c) is not triggered by a refusal to act, but instead requires an ATF rejection of an application on the merits, *Mullis*, 230 F.3d at 219; *McHugh*, 220 F.3d at 60-61; *Saccacio*, 211 F.3d at 104; *Owen*, 122 F.3d at 1354; *Burtch*, 120 F.3d at 1090; and (3) ATF's decision to adhere to a congressional directive not to process applications is not subject to challenge under the Administrative Procedure Act (APA) as action that is unreasonably withheld, or arbitrary, capricious, or not otherwise in accordance with law, *Mullis*, 230 F.3d at 219; *McHugh*, 220 F.3d at 61. Because the language in ATF's appropriations statute, the judicial review provision in Section 925(c), and the APA have not changed since *McGill*, the passage of time since that decision could not cause the five circuits that have held that a district court lacks authority to remove federal firearms disabilities to reconsider their holdings.

Respondent's reliance on the passage of time since *McGill* is a particularly unpersuasive basis for distinguishing the three most recent court of appeals decisions. Each of those decisions was issued more than four years after *McGill*, and, like the Fifth Circuit's decision in this case, each considered the effect of eight successive appropriations statutes barring ATF from processing applications for removal of federal firearms disabilities. Compare *Mullis*, 230 F.3d at 217 n.1; *McHugh*, 220 F.3d at 57 n.1; and *Saccacio*, 211 F.3d at 103-104, with Pet. App. 6a. n.11.

Because the conflict between the Fifth Circuit and five other circuits is ripe for resolution by this Court, there is no reason to await the Third Circuit's en banc decision in *Pontarelli* v. *ATF*, No. 00-1268. See Br. in Opp. 15. That decision cannot resolve the conflict that presently exists between the Fifth Circuit and five other circuits; that conflict will remain regardless of how the Third Circuit rules. Nor is there any guarantee that the Third Circuit's decision will be issued in the near future, or that the complaining party will seek Supreme Court review if the Third Circuit rules against him. The Fifth Circuit's decision squarely presents the question that divides the circuits and is an appropriate vehicle for resolving that recurring issue without undue delay.[2]

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[2] The government urged the Court to deny review in *McGill*, despite the conflict between that decision and the Third Circuit's decision in *Rice* v. *United States*, 68 F.3d 702 (1995). But at that time, only two courts of appeals had addressed the issue, and the government anticipated that all the circuits, including the Third Circuit, would eventually agree with the holding in *McGill*, eliminating any need for this Court's intervention. Unlike the situation at the time of *McGill*, six circuits have now resolved the issue, and there is no realistic possibility that the conflict between the Fifth Circuit and the other five circuits can be resolved except by a decision from this Court.

C. The Fifth Circuit's Decision Is Incorrect

Respondent also seeks to defend (Br. in Opp. 18-23) the Fifth Circuit's holding that a district court has authority to remove federal firearms disabilities. Regardless of the merits of the Fifth Circuit's holding, review is warranted in order to resolve the conflict in the circuits on that issue.

In any event, respondent's defense of the Fifth Circuit's holding is unpersuasive. Respondent first argues (Br. in Opp. 18) that the appropriations statute does not even remove ATF's authority to process applications for removal of firearms disabilities, an argument that no court, including the Fifth Circuit, has ever adopted. Congress could not have more clearly prohibited ATF from acting on applications to remove firearms disabilities. In every ATF appropriations statute passed since 1992, Congress has provided that "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)." Pet. 3 & n.1.

Respondent contends (Br. in Opp. 18) that ATF could avoid that statutory bar by collecting fees from applicants and using the proceeds to investigate and process applications. But under federal law, any fees collected by ATF would have to be deposited in the Treasury, 31 U.S.C. 3302(b), and, under the Appropriations Clause, Article I, Section 9, Clause 7, and the Anti-Deficiency Act, 31 U.S.C. 1341, money may not be drawn from the Treasury unless it has been appropriated by an Act of Congress. See *OPM* v. *Richmond*, 496 U.S. 414 (1990). ATF therefore may not use fees collected from applicants to circumvent Congress's appropriations bar.

Respondent also argues (Br. in Opp. 18) that a court may remove firearms disabilities even if ATF may not

because the appropriations statute does not impliedly repeal the judicial review provision in Section 925(c). The absence of such a repeal, however, is beside the point. Section 925(c) does not confer any independent jurisdiction on federal courts to grant relief from firearms disabilities on a de novo basis. It provides only for "judicial review" of action by ATF. The statutory bar to ATF's taking that action removes the essential prerequisite for judicial review, and leaves no role for the courts to play.

Specifically, judicial review is available under Section 925(c) only when ATF issues a "denial" of an application. Because the appropriations statute prevents ATF from "act[ing]" on an application at all, and therefore from either granting or denying an application, the appropriations statute removes the essential predicate for judicial review under Section 925(c)—an ATF "denial" of an application. Moreover, the scope of judicial review under Section 925(c) is governed by the APA, 5 U.S.C. 706, and ATF's appropriations statute eliminates any basis for setting aside ATF's refusal to process applications under APA standards. Compliance with a statutory directive not to investigate or act upon applications cannot be set aside as agency action "unlawfully withheld or unreasonably delayed," 5 U.S.C. 706(1), or as "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law," 5 U.S.C. 706(2)(A).

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For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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